

**IN THE UNITED STATES DISTRICT COURT  
FOR DISTRICT OF DELAWARE**

EMPIRE FIRE & MARINE INSURANCE  
COMPANY

Plaintiff

V.

JENNIFER AUSTIN, ZACHARY JON DANIELS, :  
EUGENE SMALLWOOD and THERESA SMALLWOOD:

## Defendants

:  
:  
:  
: Civil Action No.

**COMPLAINT FOR DECLARATORY JUDGMENT  
AND JURY TRIAL DEMAND**

Plaintiff Empire Fire & Marine Insurance Company, by way of complaint for declaratory judgment, avers as follows:

1. Plaintiff Empire Fire & Marine Insurance Company (Empire) is an insurance company incorporated in the State of Nebraska with its principal place of business located in Omaha, Nebraska.
2. Defendant Jennifer Austin is an individual residing in the state of New Jersey.
3. Defendant Zachary Jon Daniels is an individual residing in state of New Jersey.
4. Defendant Eugene Smallwood is an individual residing in the state of Delaware.
5. Defendant Theresa Smallwood is an individual residing in the state of Delaware.
6. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) as the plaintiff and defendants are citizens of different states, and the amount in controversy exceeds the sum of Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interest and costs.

**COUNT ONE**

7. On or about February 11, 2000 defendant Jennifer Austin rented a motor vehicle from Enterprise Leasing Company of Philadelphia.

8. Enterprise Leasing Company of Philadelphia, as the owner of the vehicle, maintained insurance coverage for the mandatory financial responsibility limits with companies other than Empire Fire & Marine Insurance Company and/or was self-insured.

9. The Empire Fire & Marine Insurance Company, provided supplemental rental liability protection coverage (SLP), pursuant to the terms and provisions of a written contract.

10. At the time of the aforesaid rental, defendant Jennifer Austin purchased supplemental liability protection coverage.

11. No other drivers were permitted under the terms and provisions of the rental agreement.

12. The terms and provisions of the rental agreement specifically define a violation of the rental agreement as follows:

13. VIOLATIONS OF THE CONTRACT: A violation of the contract shall exist if the car is used or driven

- a. In violation of any term or condition of this agreement
- b. By any person under the age of 25 without Owner's written permission or by anyone who has given a fictitious name or false age or address
- ... e. By any person other than Renter without written consent of Owner
- ... k. Or if renter misrepresents facts to Owner pertaining to rental, use or operation of the car.

13. Empire issued a supplemental rental liability insurance excess policy bearing policy number SI 223276 to Enterprise Leasing Company of Philadelphia, providing supplemental rental liability insurance excess coverage where purchased to provide coverage for the difference between the underlying coverage, including but not limited to the financial responsibility limits, and \$1 million, and further subject to a deductible of \$250,000.00.

14. The policy of insurance defines insured as follows:

**B. WHO IS AN INSURED**

1. Only the following are "insureds" under this policy:
  - a. The "Rentee" who has:
    - (1) Entered into a "rental agreement" with the "policyholder" shown in the Declarations; and
    - (2) Elected under the "rental agreement" to purchase optional "supplemental rental liability insurance"; and
    - (3) Paid for optional "supplemental rental liability insurance".
  - b. Additional authorized drivers whose names appear on the "rental agreement", where the "rentee" has complied with a. (1), (2), and (3) above.
2. The following are not insureds under this policy:
  - a. The "policyholder", "certificate holder" or owner of the "rental vehicle", or
  - b. Any employee, agent or family member of the "policyholder" or "certificate holder"; or
  - c. Any driver who is not an authorized driver under the terms of the "rental agreement", or whose name does not appear on the "rental agreement".

15. The supplemental rental liability insurance excess policy further contains the following applicable exclusions from coverage:

**D. EXCLUSIONS**

In addition to the exclusions contained in the "underlying insurance", this insurance does not apply to the following:

1. Loss arising out of an "accident" which occurs while the "Insured" is under the influence of alcohol or drugs, or other substances unless prescribed by a physician.
2. Loss arising out of the use of a "rental vehicle" when such use is in violation of the terms and conditions of the "rental agreement".

...

4. Loss arising out of the operation of the "rental vehicle" by any driver who is not an "insured".

16. The aforesaid rental agreement between Jennifer Austin and Enterprise Leasing Company of Philadelphia permitted no other operators of the vehicle.

17. The aforesaid vehicle was not returned at the conclusion of the rental period.

18. On March 12, 2000 Zachary Jon Daniels was involved in a motor vehicle accident with Eugene Smallwood in the state of Delaware.

19. Zachary Jon Daniels was not an authorized operator of the Enterprise vehicle under the terms and provisions of the rental agreement.

20. Jennifer Austin violated the terms of the rental agreement by permitting the vehicle to be operated by Zachary Jon Daniels.

21. Upon information and belief the vehicle had been stolen and/or not returned at the expiration of the rental.

22. Defendants Eugene Smallwood and Theresa Smallwood have asserted claims against Zachary Jon Daniels and Jennifer Austin, among others, seeking recovery for bodily injury sustained in the aforesaid motor vehicle accident.

23. Suit has been filed by Eugene Smallwood and Theresa Smallwood in the Superior Court of the State of Delaware, New Castle County under Civil Action No. 02-c-01-145 (JEB).

24. The Empire Fire & Marine Insurance Company formally disclaimed coverage to Jennifer Austin and Zachary Jon Daniels by letter dated October 31, 2000.

25. Zachary Jon Daniels is not an insured under the Empire Fire & Marine Insurance Company SLP policy.

26. Jennifer Austin breached the terms of the rental agreement.

27. The rental vehicle was being used in violation of the rental agreement at the time of the accident, and was operated by an individual who is not an insured.

28. Pursuant to the terms and provisions of the contract, no supplemental liability coverage is provided for the aforesaid accident which occurred on March 12, 2000.

WHEREFORE, plaintiff Empire Fire & Marine Insurance Company requests that this court enter judgment in its favor and against the defendants, declaring that Empire Fire & Marine Insurance Company has no duty to provide supplemental liability insurance coverage to defendant Jennifer Austin and Zachary Jon Daniels for any claims which may be asserted as a result of the March 12, 2000 motor vehicle accident, together with such other and further relief the court deems just and equitable.

### **COUNT TWO**

29. Plaintiffs incorporate herein the averments contained in the preceding paragraphs of this Complaint.

30. The Empire policy of insurance excludes coverage as follows:

In addition to the exclusions contained in the "underlying insurance", this insurance does not apply to the following:

- ...7. Fines, penalties, exemplary or punitive damages or any other type or kind of judgment or award which does not compensate the party benefiting from the award or judgment for any actual loss or damage sustained, and any costs, expenses or fees associated with the same.

31. The complaint filed by Eugene and Theresa Smallwood seeks the recovery of punitive damages which are excluded from coverage by the terms and provisions of the insurance contract.

WHEREFORE, plaintiff Empire Fire & Marine Insurance Company requests that this court enter judgment in its favor and against the defendants, declaring that Empire Fire & Marine Insurance Company has no duty to provide supplemental liability insurance coverage to defendant Jennifer Austin and Zachary Jon Daniels for any claims which may be asserted as a result of the March 12, 2000 motor vehicle accident, together with such other and further relief the court deems just and equitable.

**DEMAND FOR JURY TRIAL**

Plaintiff Empire Fire & Marine Insurance Company hereby demand a trial by jury on all issues.

MARSHALL, DENNEHEY, WARNER,  
COLEMAN & GOGGIN

By: /s/ Daniel A. Griffith, Esq. \_\_\_\_\_  
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DATED: August 17, 2005  
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